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IN THE
Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a *qui tam* relator under the False Claims Act, based on a misinterpretation of the statutory definition of an "original source" set forth in 31 U.S.C. § 3730(e)(4)?

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INTEREST OF AMICUS CURIAE[1]

The National Defense Industrial Association ("NDIA") is a nonprofit organization comprising over 1,200 corporations and 39,000 individuals from the defense industry. Many of NDIA's members manufacture military weapons and equipment and contract with the U.S. Department of Defense. NDIA's members fulfill a substantial share of the Defense Department's contracts for goods and services.

In the past twenty years, nearly a third of *qui tam* suits involved claims that had been submitted to the Department of Defense. *See* U.S. Gov't Accountability Office, *Information on False Claims Act Litigation: Briefing for Congressional Requesters* 26 (2005). New military weapons systems are becoming more complex and consume an increasing share of the defense budget, and the military is increasingly dependent on private firms to supply vital services. In these circumstances, False Claims Act suits against the defense industry are likely to proliferate.

NDIA members, like other False Claims Act defendants, rely on the Act's jurisdictional requirements to prevent *qui tam* suits based solely on public information. NDIA's members are concerned that the Tenth Circuit's

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[1] The parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk. *See* Supreme Court Rule 37.3. Pursuant to Supreme Court Rule 37.6, no party authored this brief in whole or in part and no person or entity other than NDIA or its members contributed money to the preparation or submission of the brief. A list of NDIA members is available at http://www.ndia.org. Although Petitioners' successor by merger, The Boeing Company, is a member of NDIA, The Boeing Company has not contributed any money to the preparation or submission of this brief.

decision eviscerates the first line of defense against *qui tam* suits that the Government has declined to pursue. Such suits, even if ultimately dismissed on the merits, significantly burden the process of competing for and fulfilling defense contracts and ultimately compromise the military's access to state-of-the-art supplies and services.

SUMMARY OF ARGUMENT

When it enacted the False Claims Act, Congress "walk[ed] a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). In diluting a critical check on *qui tam* abuses, the Tenth Circuit's decision ignores the plain language of the statute and increases the risk of opportunistic behavior that will harm the defense industry and the U.S. military.

The costs imposed by such actions—in which the Government, after public disclosure of the facts on which the relator's action is based, has exercised its prosecutorial discretion and declined to bring suit—are likely to have adverse consequences on the defense industry. Defense firms may become more wary of supplying technically-advanced military equipment that could generate public debate over the equipment's efficacy. Firms are also likely to pass along to the Government the costs of fighting the increased number of nonmeritorious *qui tam* suits that the Tenth Circuit's rule may foster. The increased number of such suits may also have the perverse effect of discouraging defense firms and their employees from promptly and voluntarily investigating and reporting potential problems with contracts.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION EVISCERATES THE ORIGINAL SOURCE REQUIREMENT AS AN ESSENTIAL CHECK ON ABUSIVE *QUI TAM* SUITS

The False Claims Act denies federal courts subject matter jurisdiction to hear *qui tam* suits "based upon the public disclosure of allegations or transactions" underlying the lawsuit. 31 U.S.C. § 3730(e)(4). This jurisdictional limitation—known as the "public disclosure bar"—is subject to an exception known as the "original source rule." Under this original source exception, a relator whose suit is based on public information may proceed only if he has "direct and independent knowledge of the information on which the allegations are based." *Id.* § 3730(e)(4)(B).

A. Contrary to the Tenth Circuit's decision, Stone (the relator in this case) did not have "direct and independent knowledge of the information" on which his False Claims Act allegations were based. Referring to its earlier opinion in *United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999), the Tenth Circuit "drew a distinction between the actual act of fraud, *i.e.*, the actual submission of inaccurate claims by Rockwell to DOE, and the facts underlying or which gave rise to the fraud, *i.e.*, ***the environmental, health and safety violations themselves***." Pet. App. 21a (emphasis added).

But the court then dismissed the significance of whether Stone had any direct and independent knowledge of "the environmental, health and safety violations themselves." Because Stone was terminated by Rockwell before any environmental violations occurred, his only "in-

formation" about violations was an "Engineering Report" in which he opined that the "design proposed by Rockwell management for making pondcrete . . . would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment." *Id.* at 18a (quotations and emphasis omitted).

The court then dismissed as "immaterial" Rockwell's uncontested argument that the alleged defects in design Stone identified did not cause defects in the pondcrete blocks. *Id.* at 22a. The court offered this explanation:

> For a relator to be properly qualified as an original source, he must have had direct and independent knowledge of the information on which his claim is based. But whether that claim is ultimately flawed on the merits is an analytically distinct question from the one mandated by the [False Claims Act] for establishing jurisdiction. It is for the finder of fact to determine whether the plaintiff's theory has merit; to satisfy the direct and independent prong of the original source test, relator need only show that he possessed direct and independent knowledge of the information upon which his claim is based, not that his claim is factually correct.

Id.

Under the Tenth Circuit's approach—which never came to grips with whether Stone in fact had "direct and independent knowledge" of the environmental violations—an employee whose opinions, comments or observations identified some flaw in a process or product used in performing a government contract could file a *qui tam*

complaint after public reports of some failure of performance by the contractor, even if the employee had no direct and independent information about that failure. The Tenth Circuit's approach is flawed both as a matter of law and as a matter of fact in this case.

The "original source" requirement is jurisdictional. *See* 31 U.S.C. § 3730(e)(4)(A) ("[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions [(as was conceded here)] . . . unless the action is brought by the Attorney General or . . . an original source of the infraction"). Courts therefore have an obligation to undertake a careful review of *qui tam* complaints to assure that the allegations in the complaint meet the original source requirements—"direct and independent knowledge of the information on which the allegations are based." The Tenth Circuit undertook no such review in this case.

Stone's Engineering Report related solely to purported design defects in a piping system that would be used to manufacture "pondcrete," and the Amended Complaint (filed by the United States and Stone) discussed that issue at ¶¶ 30-43. Those allegations, however, concern Rockwell's improper handling of pondcrete and resultant releases of hazardous materials, which had nothing to do with the design defects that were the subject of Stone's Engineering Report.

The Engineering Report could not have constituted "direct and independent knowledge of the information" on which the pondcrete allegations were based. At most, his information about Rockwell's disregard of his report might be the basis for an inference that the company was insufficiently attentive to the pondcrete issue. But "direct" knowledge cannot be based on such inferences. "Direct Evidence," rather, is "defined as "[e]vidence that is

based on personal knowledge or observation and that proves a fact without inference or presumption." *Black's Law Dictionary* 596 (8th ed. 2004). Stone's information was "circumstantial evidence," defined as "Evidence based on inference and not on personal knowledge or observation—also termed *indirect evidence*." *Id.* at 595 (emphasis in original). According to Wigmore,

> [T]he distinction between the two classes [of evidence] depends on whether the basis of inference is the assertion of a human being as to the existence of the thing in issue or the basis of the inference is any other fact: the one class is termed "testimonial," or "direct," evidence, the other "circumstantial," or "indirect" evidence.

1A Wigmore, *Evidence* § 24 (Tillers rev. 1983).

Moreover, as Rockwell demonstrated below, and the Tenth Circuit did not dispute, any inference that Stone drew from his Engineering Report was unfounded. *See* Pet'rs Reply to Brs. in Opp'n 6 ("Respondents never deny that the problem Stone predicted in his Engineering Report—a breakdown in the piping system—never occurred.").

Finally, Stone's other revelations—that he had been told not to discuss environmental issues with DOE and that he became aware that Rockwell's compensation under its contract was based in part on compliance with environmental and other safety statutes—do not give rise to any inferences of improper behavior by Rockwell.

As to the first, it is hardly surprising that a Government contractor would want to ensure proper managerial control over communications with the Government agency

that supervises the contract. This does not support an inference that the contractor did not report information to the Government, let alone that it made misrepresentations. As to the second, the terms of Rockwell's contract—which of course were known to the Government—at most provide a possible motive for Rockwell to fail to report environmental issues. But motives do not give rise to inferences of illegal behavior. Neither matter constitutes "direct and independent knowledge" of any fraud by Rockwell, let alone any knowledge of "actual environmental violations."

Even if Stone's information were "direct," his allegations were not "based upon" this information. The Amended Complaint never asserted that the pondcrete defects identified by Stone were the cause of the alleged release of hazardous materials. As detailed in Petitioners' brief, Stone and the Government did not argue to the jury that the environmental violations were caused by design defects. Instead, they argued that the violations were caused by human error.

Thus, under the Tenth Circuit's approach, an employee who claimed to identify a flaw in a process or product used in performing a government contract could file a *qui tam* complaint after public reports of some failure of performance by the contractor, even if the employee had no direct and independent information about that failure.

B. Without truly direct and independent knowledge of the facts on which the action is based, a relator is in no better position than is the Government—or the public to which it is accountable—to assess the costs and benefits of bringing suit. As Congress recognized, when a suit is based on public information, "the public will have at its disposal enough information to inquire of the

Government, in the event of inaction, why it failed to act and, if the answer is unsatisfactory, to enable the public to initiate corrective political action." Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L.J. 237, 265 (1995).[2]

C. Under the rule created by the Tenth Circuit's decision, however, such suits will become more and more common—as will the costs that such suits impose. Liability under the Act depends on fact-bound determinations of "intent to defraud." Consequently, it may be difficult for defendants to obtain pretrial disposition—even in nonmeritorious cases. Defendants face intense pressure to settle even meritless cases, because the availability of treble damages means that "qui tam cases quickly can become 'bet the company' propositions." David T. Bradford, *Qui Tam Litigation: An In-House Perspective*, N97WCCB ABA Legal Ed. I-19, I-26 (1997).

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[2] The weakening of the public disclosure bar as a meaningful check on certain abusive *qui tam* suits is especially problematic because "unadopted *qui tam* cases almost invariably proceed under intense Justice Department and agency silence." John Chierichella & Louis Victorino, *A Qui Tam Conundrum: When Relator's Suit Lacks Merit, What is Government's Duty to the Contractor?*, Legal Times, Feb. 28, 2000, at 30. Though the Act permits the Government to move to dismiss *qui tam* suits over the relator's objection, *see* 37 U.S.C. § 3730(c)(2)(A), the Government rarely does so—even when it has declined to intervene in the suit. *See* Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 Admin. L. Rev. 1345, 1347 n.3 (2000). Indeed, "[s]ince many *qui tam* actions allege damages in the millions and threaten significant statutory penalties, it would seem that the United States has a powerful monetary interest in not derailing such unadopted claims." Chierichella & Victorino, *supra*, at 30.

Taxpayers may ultimately bear many of these costs. Where the Government declines to intervene and the relator has not won a court judgment, federal regulations permit a contractor to recover up to 80 percent of its legal costs. *See* 48 C.F.R. §§ 31.205-47(c)(2), (e); *see also, e.g., Fluor Hanford, Inc. v. United States*, 66 Fed. Cl. 230, 232 (2005) (contractor reimbursed 80 percent of legal costs from defending *qui tam* suit). Even if the case is settled, the contractor can recover costs if "the allegations in the [*qui tam*] action had 'very little likelihood of success on the merits.'" *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1288-89 (Fed. Cir. 2002) (quoting 48 C.F.R. § 31.205-47(c)(2)). As a result, "the government frequently reimburses the defendant in an amount that substantially exceeds the [False Claims Act] penalties obtained by a relator who proceeds with a case." *See* William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201, 226 (1998).

II. THE TENTH CIRCUIT'S APPROACH WOULD ADVERSELY AFFECT THE GOVERNMENT'S PROCUREMENT OF MILITARY EQUIPMENT AND SERVICES.

In three specific circumstances, the Tenth Circuit's decision is likely to increase the number of *qui tam* suits that will tend to interfere with the efficient procurement of state-of-the-art equipment and services: (1) public disclosure of technical problems with technologically advanced and developmental military equipment, (2) public disclosure of alleged violations of complex procurement and accounting regulations, and (3) public disclosure of the results of a contractor's own internal investigation and voluntary disclosure to the Government of false claims.

A. *Qui Tam* Suits Arising Out of Public Debate Over Advanced Military Equipment.

The Tenth Circuit's approach, combined with public disclosure of the inevitable failures of some advanced military equipment, increases the opportunity for abusive *qui tam* suits by relators who possess knowledge only tangentially related to the circumstances of the failures.

A "common procurement fraud case involves substandard products or services." John T. Boese, *The Science and Art of Defending a Civil False Claims Act Case Brought by a* Qui Tam *Relator*, N97WCCB ABA Legal Ed. I-1, I-1 (1997). Defense contractors are especially vulnerable to this type of suit:

- The Department of Defense's "new weapon system program systems are expected to be the most expensive and complex ever." U.S. Gov't Accountability Office, *DOD Acquisitions: Contracting for Better Outcomes* 4 (2006) ("*DOD Contracting*").

- Given the complexity of state-of-the art weapons systems, technical difficulties during the development process are inevitable. *See* Kovacic, *supra*, at 209 ("The risk-taking associated with R&D-intensive programs inevitably will yield costly failures.").

- Given the politically-charged environment in which the military often operates, some of these complications will be high profile. *See, e.g., United States ex rel. LeBlanc v. Raytheon Co.*, 874 F. Supp. 35, 36 (D. Mass. 1995) (*qui tam* suit followed public "debate . . . about the effectiveness of defensive weaponry known as the Patriot Air Defense Missile System").

If a relator files a complaint after reading a newspaper account of test failures, for instance, the original source requirement may be the principal protection against a long, costly *qui tam* suit. Defense contractors have long depended on the public-disclosure bar—and a reasonable application of the original source exception—to avoid expensive trials of abusive qui tam suits. *See, e.g., Dingle v. BioPort Corp.*, 388 F.3d 209, 215 (6th Cir. 2004) (public-disclosure bar required dismissal of *qui tam* suit arising out of manufacture of anthrax vaccine for military use); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1150 (2d Cir. 1993) (relator not original source of allegations arising out of crash of Army Black Hawk helicopter).

Yet under the Tenth Circuit's expansive view of "original source," a *qui tam* suit could be brought by a relator with any "information" about the equipment at issue—even if not directly related to the facts that form the basis for the suit. A supervisor's rejection of an employee's proposed design for a new piece of equipment could become "original source" fodder for a *qui tam* suit based on entirely unrelated public information about which the relator had no direct knowledge. The original source rule reflects Congress' judgment that a *qui tam* suit in this circumstance is unlikely to serve the public interest.

In an analogous context, the Court has recognized that imposing undue liability upon federal defense contractors affects the cost and availability of military technology to the government: "The imposition of liability against Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its prices." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

This Court's concerns were borne out by a 1994 survey of defense contractors, commissioned by the U.S. Department of Defense, which found that "world class commercial-oriented firms are increasingly reluctant to participate in the defense market because of concerns that the DoD regulatory environment will raise their costs and expose them to unacceptable civil and criminal risks." *The DoD Regulatory Cost Premium: A Quantitative Assessment* 1 (1994) (report prepared for Secretary of Defense William J. Perry). Under the Tenth Circuit's approach, defense firms will have an additional incentive "to limit dealings with the government to the sale of mature products with stable designs." Kovacic, *supra*, at 235.

B. *Qui Tam* Suits Based on Publicly Disclosed Disagreements About Technical Regulatory Matters.

The Tenth Circuit's decision also subjects defense contractors to counterproductive *qui tam* suits based on the public disclosure of disagreements between the contractor and the Government about alleged technical violations of complex regulations. Many such disagreements are normally worked out in the course of contract administration. Allowing *qui tam* relators to sue contractors on the basis of the public disclosure of such disputes, without requiring that the relator have direct and independent knowledge of the facts upon which his suit is based, disserves the cause of efficiency in government contracting. For *qui tam* relators are "less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc," given that they "are motivated primarily by prospects of monetary reward

rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).[3]

If such *qui tam* suits proceed, based on a broad exception to the public disclosure bar, "[t]he costs of contractors and DOD may increase as the parties resort more extensively to formal techniques for modifying regulatory or statutory restrictions." Kovacic, *supra*, at 234. Department of Defense contracts already "are far more complex and detailed than their commercial counterparts. The voluminous nature of these contracts compels program managers to devote considerable time to reviewing and analyzing contract provisions, and taking action to ensure full compliance with the range of contract requirements." *DOD Regulatory Costs*, *supra*, at 24. Such administrative burdens would be magnified if contractors faced the threat that unwarranted *qui tam* litigation might arise from the publication of any compliance misstep.

In sum, the Tenth Circuit has opened the door to *qui tam* suits based on public information about minor regulatory violations. When, in these circumstances, the Government loses its prosecutorial discretion, taxpayers

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[3] The cases illustrate the Government's reluctance to dismiss even those *qui tam* suits that undermine the Government's relationships with defense contractors. In *Hughes Aircraft*, the relator sued after an audit initially suggested overcharging by defendant. Although the Government declined to intervene, it also did not move to dismiss the action, 520 U.S. at 943 n.2—even after "[t]he Government ultimately reversed its preliminary determinations[and] conclude[ed] that the [practice at issue] had actually benefited the Government." *Id.* at 943 n.1. In another case, the Government did not seek to dismiss a case involving a contract with the U.S. Navy, notwithstanding testimony on behalf of defendant from "the procuring officer with authority to sign and execute contracts on behalf of the Navy." *See United States ex rel. McCoy v. Seward Marine Servs., Inc.*, No. 91-1642, 1992 WL 182816, at *2-*3 (4th Cir. Aug. 3, 1992).

foot the bill: contractors' compliance costs "ultimately [are] absorbed by DoD in the form of increased unit costs for military equipment and services." *Id.* at 12.

C. *Qui Tam* Suits Arising Out of Internal Investigations and Voluntary Disclosures

Ironically, by making it easier for relators to bring *qui tam* suits based on information in the public domain, the Tenth Circuit's formulation may also impede the detection or reporting of problems with equipment supplied to the Department of Defense.

1. Rigorous enforcement of the public disclosure bar—and faithful interpretation of the original source exception—discourages employees from sitting on suspicions or predictions about potential problems with the fulfillment of defense contracts. The public disclosure bar is "intended to spur relators into bringing information to the Government at the earliest possible instance so that the Government may take effective action." Salcido, *supra*, at 278.

But as Stone's conduct illustrates, defense contractors often face *qui tam* suits brought by employees who claim to have suspected fraud for years—but do not come forward with these suspicions until after they have been fired or laid off, or until they have allowed the potential bounty to accumulate over time. *See, e.g.*, *Wang v. FMC Corp.* 975 F.2d 1412, 1417 (9th Cir. 1992) (relator claimed to have been aware of the fraud in 1983 but "waited until December, 1987, a year after he was fired by [the defense contractor], to bring the alleged fraud to Government's attention"); *Fluor Hanford*, 66 Fed. Cl. at 231 (laid-off employee had initially filed a *qui tam* suit against a different company, but "amended his *qui tam* complaint to

add [his former employer] as a defendant following his dismissal").

Absent the Tenth Circuit's misinterpretation of the original source exception, the relator who sits on such suspicions does so at his peril. The longer he waits, the greater the risk that material information or allegations will become public and thus bar his suit. But in expanding the original source exception to cover cases in which the employee does not have direct and independent knowledge of the allegation upon which the suit is based, the Tenth Circuit approach may encourage employees to delay reporting their suspicions.

2. The Tenth Circuit's expansive interpretation also discourages contractors from involving their employees in internal investigations of potential problems. Because the Tenth Circuit conferred original source status on relators with information only tangential to the actual problem, the court has made it riskier for employers to disseminate information from which an employee could infer, indirectly, that fraud was afoot. By conducting an internal investigation into potential problems with the fulfillment of defense contracts, then, conscientious "contractors may unwittingly cultivate a number of potential 'original source' qui tam plaintiffs by exposing them to fraud allegations and using their factual contributions" to paint a more complete picture. Robert S. Ryland, *The Government Contractor's Dilemma: Voluntary Disclosures as the Source of Qui Tam Litigation*, 22 Pub. Cont. L.J. 764, 810 (1993).

3. An expansive interpretation of the original source exception further undermines the Defense Department's efforts to encourage voluntary disclosure of problems with military contracts. In 1986, the Department of Defense established a voluntary

compliance program that "encourages Defense contractors to adopt a policy of voluntarily disclosing potential civil or criminal fraud matters affecting their corporate contractual relationships with DoD." Inspector General, Dep't of Defense, *The Department of Defense Voluntary Disclosure Program* 1 (1990) ("*DOD Voluntary Disclosure*"). To encourage voluntary disclosures, the Pentagon "will consider such cooperation as an important factor in any decisions that the Department takes in the matter." Letter from William H. Taft IV, Deputy Secretary of Defense 1 (July 24, 1986), *reprinted in DOD Voluntary Disclosure*, *supra*, at app. 1.

Unfortunately,

> many contractors believe that the goals of the self-governance programs to increase voluntary disclosures and reduce reliance on adversarial proceedings have not been fulfilled because participations in self-governance initiatives that were designed to avoid litigation may offer no protection against and may even become the source of qui tam litigation.

Ryland, *supra*, at 765. This concern arises largely "from unresolved ambiguities in False Claims Act jurisdiction for actions brought by purported 'original sources' of fraud allegations." *Id.*

Indeed, the Tenth Circuit's expansive original source exception may imperil contractors that disclose problems voluntarily. For instance, in one case, a relator "base[d] his claims on [the defense contractor's] own self-critical assessment of its work after the project was ended by the Army," and the "memorandum relied on by [the relator] was part of a dialogue with the Army." *Wang*, 975 F.2d at

1421. Even if such information were part of the public record after the firm had voluntarily disclosed it to the Government, the Tenth Circuit's interpretation of the original source exception would allow a relator's suit to proceed based on more limited, indirect information that predated the disclosure.

CONCLUSION

For the preceding reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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